JAN I. GOLDSMITH, City Attorney
ANDREW JONES, Assistant City Attorney
JENNIFER K. GILMAN, Deputy City Attorney
California State Bar No. 231447
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, California 92101-4100
Telephone: (619) 533-5800
Facsimile: (619) 533-5856

Attorneys for Defendants CITY OF SAN DIEGO, CHIEF OF POLICE WILLIAM LANSDOWNE, OFFICER D. McCLAIN, OFFICER A. SAVAGE, OFFICER SACCO, OFFICER C. HERNANDEZ, and OFFICER DOBBS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHANNON ROBINSON, DANTE HARRELL, Plaintiffs, v. CITY OF SAN DIEGO, WILLIAM LANSDOWNE, ARIEL SAVAGE, an individual, DANIEL MCLAIN, an individual, DANIEL SACCO, an individual, CARLOS HERNANDEZ, an individual, MATTHEW DOBBS, an individual, and DOES 1-50, inclusive. Defendants.	Case No. 11cv0876 AJB (WVG) **MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION, OF DEFENDANTS CITY OF SAN DIEGO, ARIEL SAVAGE, DANIEL MCCLAIN, DANIEL SACCO, CARLOS HERNANDEZ, AND MATTHEW DOBBS** Judge: Hon. William V. Gallo Courtroom: F Trial: Not Set Date: April 25, 2013 Time: 2:00 p.m.

TABLE OF CONTENTS

I INTRODUCTION..1

II STANDARD FOR MOTION FOR SUMMARY JUDGMENT 4

III LEGAL ARGUMENT 4

A. Qualified Immunity Insulates the Defendant Police Officers from Liability 5

B There was no First Amendment Violation..13

C. Plaintiffs cannot establish Malicious Prosecution 16

D. Plaintiffs' Claim for Common Law Negligence Fails 17

E. Plaintiffs' Claims for Improper Screening, Hiring, Training, Supervision, and *Monell* is Without Merit 18

1. General Law on a *Monell* Claim 18

2. Plaintiff is Unable to Establish That the City Was Deliberately Indifferent as to Training, Supervision, Disciplining and Hiring............19

F. Unless the Court Finds the Actions of the Defendant Officers Unconstitutional, the City Cannot be Held Liable 20

IV CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Acri v. Varrian Associates, Inc.,
114 F.3d 999 (9th Cir. 1997) 10

Anderson v. Creighton
483 U.S. 635 (1987) 5, 10, 11, 12

Beck v. Ohio
379 U.S. 89 (1964) 16

Bilbrey v. Brown
738 F.2d 1462 (9th Cir. 1994) 11

Bivens v. Six Unknown Named gents of the Federal Bureau of Narcotics
456 F.2d 1339 (2d. Cir. 1972) 11

Carnell v. Grimm
74 F.3d 977 (9th Cir. 1996) 10

Carter v. Three Unknown Police Officers
619 F.Supp. 1253 (N.D. Del. 1985) 11

Celotex Corp. v. Catrett
477 U.S. 317 (1986). 4

City of Canton, Ohio v. Harris
489 U.S. 378 (1989) 19, 20

City of Los Angeles v. Heller
475 U.S. 796 (1986) 18, 20

City of Oklahoma v. Tuttle
471 U.S. 808 (1985) 19, 20

City of Simi Valley v. Superior Court
111 Cal. App. 4th 1077 (2003) 17

Duisen v. Administrator and Staff, Fulton St. Hosp., No. 1, Fulton, Mo.
332 F.Supp. 125 (W.D. Mo. 1971) 18

Ellis v. Blum
643 F.2d 68 (2d Cir. 1981) 18

Estate of Dietrich v. Burrows
167 F.3d 1007 (6th Cir. 1999) 13

Falvo v. Owasso Ind. Sch. Dist.
223 F.3d 1203 (10th Cir. 2000) 6, 13

Forster v. County of Santa Barbara
896 F.2d 1146 (9th Cir. 1990) 11

Gardenhire v. Schubert
205 F.3d 303 (6th Cir. 2000) 6

Graham v. Connor
490 U.S. 386 (1989) 6, 12

Groh v. Ramirez
540 U.S. 551 (2004) 5

Harlow v. Fitzgerald, ... 4, 5
457 U.S. 800, 818 (1982).

Harris v. Smith
157 Cal. App. 3d 100 (1984) 17, 19

Hope v. Pelzer
536 U.S. 730 (2002) 5, 12

Hudson v. Burke
617 F.Supp. 1501 (D.C. III. 1985) 19

Hunter v. Bryant
502 U.S. 224 (1991) 10

Jensen v. City of Oxnard
145 F.3d 1078 (9th Cir. 1998) 6

Kirkpatrick v. City of Los Angeles
803 F.2 485 (9th Cir. 1986)........ 18

LSO, Ltd.v. Stroh
205 F.3d 1146 (9th Cir. 2000) 6

Malley v. Briggs
475 U.S. 335 (1986) 11

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986). 4

McConnell v. Adams
829 F.2d 13195 (4th Cir. 1987) 12

Merritt v. County of Los Angeles
875 F.2d 765 (9th Cir. 1989) 20

Michigan v. DeFillippo
443 U.S. 31 (1979) 16

Mitchell v. Forsyth
472 U.S. 511 (1985) 5

Monell v. Dept. of Social Services of City of New York
436 U.S. 658 (1978)……………………………………………………………18, 19, 20

Oppenheimer v. City of Los Angeles
104 Cal. App. 2d 545 (1951) 17

Pearson v. Callahan
555 U.S. 223 (2009) 4, 5, 6, 12

People v. White
107 Cal. App. 3d 636 (2003) 7

Post v. City of Fort Lauderdale
7 F.3d 1552 (11th Cir. 1993) 12

Price v. County of San Diego
990 F.Supp. 1230 (1998)……………………………………………………………17

Quintanilla v. City of Downey
84 F.3d 353 (9th Cir. 1996)………………………………………………………..18, 20

Reynolds v. County of San Diego
84 F.3d 1162 (9th Cir. 1996) 10

Robinson v. Solano County
278 F.3d 1007 (9th Cir. 2002) 10

Rohde v. City of Roseburg
137 F.3d 1142 (9th Cir. 1998) 17

Sanders v. City of Fresno
551 F.Supp. 2d 1149 (E.D.Cal. 2008) 17

Saucier v. Katz
533 U.S. 194 (2001) 5, 6, 8, 10, 12

Scott v. Henrich
39 F.3d 912 (9th Cir.1994) 6

Smiddy v. Varney
665 F.2d 261 (9th Cir. 1981) 11

Ward v. County of San Diego
791 F.2d 1329 (9th Cir. 1986). 13

Wilson v. Layne
526 U.S. 603 (1999) 12

Wong Sun v. United States
371 U.S. 471 (1963) 16

Woodward v. City of Worland
977 F.2d 1392 (10th Cir. 1992) 13

Other Authorities

California Vehicle Code section 16028(a) 7, 8, 10

Defendants CITY OF SAN DIEGO, CHIEF OF POLICE WILLIAM LANSDOWNE, and SAN DIEGO POLICE OFFICERS McCLAIN, SAVAGE, SACCO, HERNANDEZ, and DOBBS (collectively "Defendants") respectfully submit the following Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment [MSJ].

I. INTRODUCTION

On March 30, 2010, San Diego Police Officers Savage and McClain stopped Plaintiffs' vehicle on suspicion of a stolen vehicle. The basis for this suspicion was formed when they ran the license plate of the vehicle for Plaintiffs' car and it did not match the make and model of the car Plaintiffs were driving. After pulling the Plaintiffs over, Officer Savage approached the vehicle to investigate the stolen vehicle. Office McClain took the position of cover.

Incident to his investigation, Officer Savage checked the Vehicle Identification Number [VIN] on the windshield of the vehicle against the records for the vehicle. In so doing Officer Savage was able to determine that the vehicle was not stolen. However, notwithstanding that fact, the driver of the car did not provide proof of insurance for the vehicle. Officer Savage returned to his vehicle to write a citation for operating a vehicle without proof of insurance. Officer McClain stayed at Plaintiffs' car. When Officer McClain asked Plaintiff Robinson – the owner of the vehicle – for her identification so that Officer Savage could write a ticket to the owner of the vehicle, Plaintiff Robinson began making phone calls and talking on the phone instead of speaking with or cooperating with the officers. She claimed that she had the officers' "supervisor" on the phone as a basis for refusing to comply with the officers' requests for information. As she continued to ignore the officers and persisted in speaking to someone on the phone, it was clear that Plaintiffs were effectively taking control of the traffic stop. Officers Savage and McClain could not complete the traffic stop without the cooperation of the Plaintiffs. Instead, the Plaintiffs fought with the officers.

The situation quickly escalated from there. Plaintiff Robinson placed a call to 9-1-1 dispatch. Although the dispatch operator **repeatedly** told Plaintiff Robinson to **cooperate with the officers**, she refused to do so. On the contrary, she refused to provide them with information that would allow them to finish the stop; she leaned across the driver of the car and held his door shut as the driver of the car leaned across her and held her door shut; and ultimately Plaintiffs began physically fighting with the defendant officers.

Officer McClain, who was unable to gain the cooperation or compliance of Plaintiff Robinson, asked her step out of the car. When she refused to do so, Officer McClain attempted to open Plaintiff Robinson's door. It was at this time that Plaintiff Harrell slapped Officer McClain's hand away and from the door lock. When Officer McClain attempted to open the car door, Plaintiff Harrell (in the driver's seat) reached across Plaintiff Robinson (in the passenger seat), wrapped an arm around her, and with his other arm pulled the car door shut, effectively refusing to allow Plaintiff Robinson out of the car. However, lest it be thought that Plaintiff Robinson would have cooperated but for the interference of Plaintiff Harrell, Plaintiff Robinson also reached across Plaintiff Harrell to hold his door shut as well. Thus, any attempts by police officers to speak with the plaintiffs and resolve this issue by speaking were thwarted by the **Plaintiffs**, who now complain about Defendants' failure to do so.

The situation continued to escalate. There were two police officers at the scene at the time that Plaintiffs' vehicle initially came to a stop, but there were **three** passengers in the vehicle. Neither of the Plaintiffs were cooperating; they were fighting:

- Plaintiff Harrell had physically interfered with Officer McClain's attempt to get Plaintiff Robinson out of the car;
- Harrell was holding the door shut; Robinson was holding Harrell's door shut;
- Plaintiff Robinson was on the phone, ignoring the officers; and
- the officers were concerned about their own safety and the safety of the public in this situation.

The officers were right to be concerned. The Plaintiffs were verbally and physically aggressive toward them. Officers Savage and McClain called for backup to assist them. When backup arrived, Plaintiff Harrell, a large, strong man, also began to violently fight with the officers, including swinging his elbow at Officer Sullivan and kicking backup Officer Sacco. Exhs. A, B. Ultimately officers had to use their Tasers on Plaintiff Harrell in response to the physical assault on the officers. Both plaintiffs had refused to cooperate with the officers or civilly step out of the car when requested. In fact, Plaintiff Robinson testified in her deposition that only **after** the fight ensued between the Plaintiffs and the police officers, and she saw that the officers had to use force in order to gain compliance over Plaintiff Harrell, did she agree to cooperate with the officers:

Q. Did you see Dante react to the Taser?
A. I seen -- I saw Dante -- basically, he was
11:42:23 just screaming, "They can't do this to me." But other
than a -- a reaction, he wasn't moving.
Q. Physically, where was Dante positioned in the
car when you saw this?
11:42:56 A. The driver's side of my Pontiac Sunfire still
in the seat.
Q. Was he leaning over you?
A. He was holding me.
Q. And so where were you?
A. In his -- my head was in his lap.
Q. The whole time?
A. No.
Q. Okay. When was your head not in his lap?
A. When they were going to Tase him. I jumped
up, and that's when I was basically saying -- or
11:43:28 screaming, "I'll do anything" -- pleading, "I'll do
anything that you want me to do. Just please do not
Tase him."
Q. Had you told them that -- I'm sorry. Strike
that.
Had you told the police officers at any point
prior to that that you would do what they wanted you to

24 do?
25 A. No.

Exh. C: Robinson depo 49:25-50:25.

The officers did nothing more than respond to the assault perpetrated on them by the Plaintiffs. Furthermore, a percipient witness to the event gave a statement at the scene that demonstrate the Plaintiffs began to fight with the officers, **not** that the officers began to fight with the Plaintiffs. Exh. D.

Plaintiffs tell an outrageous story, but they cannot support it with facts. The record in this case shows both plaintiffs fighting with the police officers. Civilian (non-police) witnesses at the scene indicated that the police officers did not begin what ultimately developed into a fight. Exh. D. Given the standard for qualified immunity, entry of summary judgment or summary adjudication in favor of defendants is appropriate here.

II. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 permits a court to grant summary judgment where (1) the moving party demonstrates the absence of a genuine issue of material fact and (2) entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). The initial burden of establishing the absence of a genuine issue of material fact falls on the moving party. *Id.* at 323. Once the moving party establishes the absence of genuine issue of material fact, the burden shifts to the nonmoving party to set forth facts showing that a genuine issue of disputed fact remains. *Id.* at 324. When ruling on a summary judgment motion, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. LEGAL ARGUMENT

A. Qualified Immunity Insulates the Defendant Police Officers from Liability

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity balances two important interests: "[T]he need to hold public officials accountable when they exercise power irresponsibly and the need to shield officers from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, *supra*, 129 S. Ct. at 815. Qualified immunity recognizes the potential for substantial social costs by shielding government officials from civil damages unless clearly established law proscribed the actions they took. *Anderson v. Creighton*, 483 U.S. 635, 638-639 (1987). The protection of qualified immunity is needed because claims against government officials can "entail substantial costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Id.* at 638 (internal citations and quotations omitted).

As the *Harlow* Court aptly stated, lawsuits against public officers "run against the innocent as well as the guilty…" 457 U.S. at 814. Thus, a ruling on qualified immunity is to be made at the earliest possible stage of litigation, because it is "an entitlement not to stand trial o face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (*citing Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *see also Anderson v. Creighton*, 483 U.S. at 646. "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' " *Pearson*, 129 S.Ct. at 815 (*quoting Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J. dissenting)).

The Supreme Court set forth a two-part test for the qualified immunity analysis: "The threshold inquiry a court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation. *Hope v. Pelzer*, 536 U.S. 730, 736 (*citing Saucier v. Katz*, 533 U.S. 194, 201 (2001)). If a constitutional right would have been violated under the plaintiff's version of the facts, "the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201. In 2009, the Supreme Court reconsidered the two-step procedure set forth in *Saucier v. Katz* and concluded that "while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts … should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 129 S. Ct. at 818.

In a Section 1983 action, it is the plaintiff who bears the burden of (1) establishing that the defendant's actions violated a federal constitutional right; and (2) that the right was clearly established at the time of the conduct at issue. *Falvo v. Owasso Ind. Sch. Dist.*, 223 F.3d 1203, 1218-19 (10th Cir. 2000), reinstated in pertinent part *Falvo v. Owasso Ind. Sch. Dist.*, 288 F.3d 1236; *LSO, Ltd.v. Stroh*, 205 F. 3d 1146, 1157 (9th Cir. 2000). There is a "strong presumption" that state actors have properly discharged their duties and, to overcome that presumption, the plaintiff must present clear evidence to the contrary. *Gardenhire v. Schubert*, 205 F.3d 303, 319 (6th Cir. 2000).

In their Motion for Summary Judgment (Doc No. 39 filed December 24, 2012) Plaintiffs spend a significant amount of time talking about what they think Defendants should have done on the date of the incident. However, under the qualified immunity and Fourth Amendment jurisprudence, wide latitude is given to law enforcement officers. "Officers . . . **need not avail themselves of the least intrusive means** of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994) (emphasis added). The determination of whether an officer used excessive force "must be judged from the perspective of a **reasonable officer on the scene**, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (emphasis added). The determination "must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97; *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir. 1998).

Also, the relatively recent Supreme Court case of *Pearson v. Callahan*, decided January 21, 2009, appears to allow for a court to decide the second prong *Katz v. Saucier*, without deciding the first: "[W]e conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory"; "The judges . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 129 S.Ct. 808, 818 (2009). .

Plaintiffs fought with the defendant police officers; at first verbally, and then physically. Plaintiff Robinson was on the phone for part of the time with 9-1-1 dispatch. At one minute and six seconds after the 9-1-1 call begins, Plaintiff Robinson can be heard telling officers that she does not have proof of insurance (1:06), for which Officer Savage attempted to write a citation, and otherwise not cooperating with the officers. Plaintiff admitted in her deposition that, until the situation escalated to the point that Defendants used force on Plaintiff Harrell, Plaintiff Robinson did not comply with the officers' orders. Exh. C: Robinson depo 49:25-50:25.

There is no constitutional right to be free of a citation where a vehicle is being driven without proof of insurance. At one minute and six seconds (1:06) after the 9-1-1 call begins, Plaintiff Robinson herself can be heard telling officers that she does not have proof of insurance for her vehicle. Officer Savage intended to write a citation for this very offense. Plaintiffs attempt to contend that they have a constitutional right to drive their car without proof of insurance and further attempt to bootstrap this argument into an unlawful detention in violation of 42 U.S.C. section 1983.

Plaintiffs cite to California Vehicle Code section 16028(b) which requires the driver of the car to be given a citation for failure to have proof of insurance. Plaintiffs claim that they had committed no infraction for driving without proof of insurance, and that the fact that they drove without proof of insurance was in no way citable. However, even if the citation was brought under the wrong statute, this inquiry is irrelevant. An officer's reliance on the wrong statute does not render his action unlawful if there is a right statute that applies to the defendant's conduct. *People v. White*, 107 Cal. App. 3d 636, 641 (2003). Moreover, it ignores the fact that **even if** Officer Savage was writing the citation to Plaintiff Harrell – who also could not provide proof of insurance for the vehicle – the registered owner's information is needed on the citation. Exh. E: Savage Depo. 48:3-11.

Furthermore, to the extent that Plaintiffs claim a driver is only required to show evidence of financial responsibility if he is being cited for another Vehicle Code violation or is involved in an accident, this argument only demonstrates their unfamiliarity with the Vehicle Code. California Vehicle Code section 16028(a) states, "(a) Upon the demand of a peace officer pursuant to subdivision (b) or upon the demand of a peace officer or traffic collision investigator pursuant to subdivision (c), every person who drives a motor vehicle upon a highway shall provide evidence of financial responsibility for the vehicle that is in effect at the time the demand is made. However, a peace officer shall not stop a vehicle for the sole purpose of determining whether the vehicle is being driven in violation of this subdivision."

Plaintiffs themselves point to the California Judge's Benchguide as "support" for their position. To the contrary, that publication states that "A driver who fails to provide proof of insurance on request by an officer **or** traffic collision investigator during a traffic stop (but not for the sole purpose of determining whether the driver has insurance) is **guilty of an infraction**." Pltf. Exh. N-3, § 82.18 (emphasis added). Plaintiffs do not allege that Officers Savage and McClain pulled them over solely for the purpose of determining if they had insurance; the Plaintiffs concede that the traffic stop began as the result of a mismatched license plate.

Even if this Court were to find that there was a constitutional violation, it must determine "whether officers could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right." *Saucier*, 533 U.S. at 205. Immunity attaches if the officer was reasonably mistaken and/or if the constitutional right was not clearly established.

In his deposition, Officer Savage describes the reasonableness of his decision to issue a citation.

> Q. Well, did you know that the Vehicle Code
> provision prohibits a person from driving a car without
> 10:07:00 having proof of insurance?
> MS. GILMAN: May call for a legal conclusion.
> MR. IREDALE: I'm asking for his
> understanding of it, that's right.
> BY MR. IREDALE:

10:07:27

Q. Did you know that?

A. I know that the section says that the registered owner of the vehicle must provide the insurance for that vehicle, and if the driver of a vehicle is driving a vehicle that is not theirs, they must also provide insurance for that vehicle, proof of insurance.

Q. Proof of insurance. Well, actually, are you sure of that? Isn't it the infraction, if any, is committed by the driver and not the owner?

MS. GILMAN: I'm sorry. What's the question?

(Whereupon, the pending question is read by the Reporter as follows:

"Q. Proof of insurance. Well, actually, are you sure of that? Isn't it the infraction, if any, is committed by the driver and not the owner?")

BY MR. IREDALE:

Q. Your answer?

A. The registered owner of the vehicle is still required to provide proof of insurance for the vehicle.

10:07:58

Q. All right. Now, is this your rule or is there some provision of the Vehicle Code that provides that?

A. It is not my rule.

Exh. E: Savage Depo. 37:18-38:24.

Even assuming that Officer Savage was incorrect in his interpretation of the California Vehicle Code, there is no evidence that his decision to issue a citation was unreasonable in any way. In fact, Officer Savage goes on to testify as follows:

> 19 Q. All right. But -- well, in fairness to you,
> 20 it's not a numbers issue. It's the substance of the
> 21 Vehicle Code. The section of the Vehicle Code that you
> 10:09:57 22 intended to write up was the section that said that
> 23 it's illegal or it's an infraction not to have proof of
> 24 insurance in the car, correct?
> 25 A. Correct.
> 1 Q. And that's one section that you understand or
> 2 are there multiple sections?
> 3 A. Regarding the Vehicle Code?
> 4 Q. Regarding possession of proof of insurance
> 5 while the car is being driven.
> 6 A. That is the section that I understand.

Exh. E: Savage Depo. 40:19-41:6.

"The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier*, 533 U.S. at 201-01; *see also Robinson v. Solano County*, 278 F.3d 1007, 1012 (9th Cir. 2002). Put another way, if reasonable police officers would disagree whether an arrest or a particular use of force was lawful, the right to be free from the arrest or force would not be clearly established and the officer would be entitled to qualified immunity. *See Anderson, supra*, 483 U.S. 635, 638-40. "Whether the law was clearly established is pure question of law for the courts to decide." *Carnell v. Grimm*, 74 F.3d 977, 978 (9th Cir. 1996). "The inquiry is not 'whether another reasonable or more reasonable interpretation of events can be construed … after the fact." *Reynolds v. County of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996), *overruled on other grounds by Acri v. Varrian Associates, Inc.*, 114 F. 3d 999 (9th Cir. 1997) (*quoting Hunter v. Bryant*

502 U.S. 228 (1991). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." In the Fourth Amendment context, it is "inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present" and "in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Anderson*, *supra*, 483 U.S. at 641.

As the Ninth Circuit aptly noted in *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981), "[i]t is necessary that police officers be immune when they reasonably believe that probable cause existed, even though it is subsequently concluded that they did not, because they 'cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves.' " *Id.* at 266 (*quoting Bivens v. Six Unknown Named gents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1349 (2d. Cir. 1972) (Lumbard, J., concurring)).

Thus, a police officer is entitled to qualified immunity from suit or damages arising out of a Fourth Amendment violation if a reasonable officer possessing the same facts as the Defendant officer could have reasonably believed that the search or arrest was supported by probable cause even if a court later determines it was not. *See Bilbrey v. Brown*, 738 F.2d 1462, 1467 (9th Cir. 1994); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1147-48 (9th Cir. 1990) (finding an officer is "qualified immune from a suit for damages … unless 'a reasonably well trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant' ") (*quoting Malley v. Briggs*, 475 U.S. 335, 345 (1986)).

The underlying incident here began first with the need of the police officers to ensure that Plaintiffs' vehicle wasn't stolen. In so doing, the officers discovered that the occupants of the vehicle did not have proof of insurance. Officer Savage decided to write a citation for failure to provide proof of insurance. Upon the defendant officers' reasonable request for proof of identification, the occupants of the car began fighting with the officers. At first, it was simply verbal fighting; then it escalated to failure to cooperate with the officers; then it escalated to a physical altercation. Civilian witnesses at the scene of the incident stated that the police asked the female occupant of the car to get out, but she wouldn't, and that the police asked politely a few more times. When the police eventually tried to take her out of the car, she locked arms with the male inside and the police couldn't get her out. Exh. D.

Moreover, if the Court finds a constitutional violation or simply chooses to utilize the approach announced in *Pearson v. Callahan*, its first inquiry would be whether the right alleged violated was clearly established at the time of the defendant's alleged misconduct. *Pearson v. Callahan*, 129 S.Ct. at 816. The question whether the law is clearly established is not of a general nature but one in a particularized sense. The standard is set forth in *Saucier v. Katz*.

> In this litigation, for instance, there is no doubt that *Graham v. Connor*, *supra*, clearly established the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *483 U.S. at 640*. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. See *Wilson v. Layne, 526 U.S. 603, 615 (1999)* ("[A]s we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established").

Saucier v. Katz, 533 U.S. at 202.

Shortly after *Saucier*, the Supreme Court reiterated in *Hope v. Pelzer* that "the salient question . . . is whether the state of the law . . . gave [the officers] *fair warning* that [their] alleged treatment of [the plaintiff] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 731 (2002) (emphasis added). As in *Saucier*, *Hope* repeated that officers sued in a Section 1983 civil action have a "*right to fair notice*." *Id*. at 739 (emphasis added).

If the case law in factual terms has not staked out a bright line rule, qualified immunity almost always protects the defendant. *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993); *McConnell v. Adams*, 829 F.2d 1319, 1325 (4th Cir. 1987) ("in cases where there is a legitimate question whether those principles extend to the particular case before the court or whether the particular case might constitute an exception to those principles, the court should sustain a qualified immunity defense;" when a legitimate question exists, officer is entitled to qualified immunity). A right is arguably not considered clearly established within the subject district until it has been authoritatively decided first by the United States Supreme Court, then court of appeals, or finally decisions of other circuits in which the alleged constitutional violation occurred. *Falvo, supra*, 233 F.3d at 1219; *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999). Moreover, a pronouncement of the state court does not necessarily clearly establish the governing law. *Ward v. County of San Diego*, 791 F.2d 1329, 1333 (9th Cir. 1986). Nor will a District Court decision ordinarily establish the law of its own circuit, much less the law of the other circuits. *Woodward v. City of Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992).

No claim of fair warning can be asserted in the case at hand. Neither the Supreme Court nor the Ninth Circuit Court of Appeals offer plaintiffs any comfort for their argument in finding a constitutional violation, as there are no cases following the specific contours of the instant matter establishing a constitutional violation. As discussed herein, Defendants enjoy qualified immunity. For the reasons set out herein, Defendants respectfully request that this court enter summary judgment in favor of Defendants.

B. There was no First Amendment Violation

In their Second Amended Complaint, Plaintiffs allege that Dante Harrell had a "First Amendment right to record the police" and that Plaintiff Robinson had "a Constitutional right as a citizen to petition the government for a redress of grievances."

Plaintiff Robinson was **not** arrested because she was making a complaint, contrary to Robinson's argument or insinuation. Officer McClain testifies as follows:

8 Q. As a matter of fact, at some point, you told
9 her she was under arrest; is that correct?
10 A. Yes.
11 Q. And she was under arrest because she was on
12 the phone and trying to make a complaint about you?
13 A. Yes.
14 Q. And so because of that, you arrested her?
15 A. I arrested her because she was refusing to
16 comply with my instructions.

> Q. Well, your instructions were, "Get off the
> 1:35:29 phone. Stop making a complaint, and get out of the
> car"?
> MS. GILMAN: Objection. Misstates testimony;
> facts not in evidence.
> BY MR. IREDALE:
> Q. Your answer?
> A. Although it did happen quickly, **there were**
> **several steps in between that**.

Exh. F: McClain Depo: 112:8-25.

Plaintiff Robinson attempts to use **her counsel's testimony in a deposition** as evidence that Officer McClain arrested her because she was making a complaint. On the contrary, as can be seen from the deposition transcript, it was Mr. Iredale who said "Stop making a complaint and get out of the car," a suggestion that received objections from Defense Counsel. Then, in response, Officer McClain was obligated to respond to **Mr. Iredale's** statement and clarified that there were several steps between asking her to get off the phone and get out of the car. While the form of the question may **suggest** that it was for the purpose of getting Plaintiff to stop making a complaint, **the officer himself did not so testify.**

With respect to Plaintiff Harrell, his allegation of a violation of his First Amendment right is just that – an unfounded allegation. On the contrary, Officer McClain testified that the video would have been helpful for the police:

> Q. Did you or one of the other persons present
> ask Ms. Robinson what was the password to the ustream
> feature of the cell phone?
> A. It sounds vaguely familiar, but I don't
> specifically remember doing that.
> Q. Did you erase the video from the phone?
> A. Certainly not.

Q. Did you see any of the other officers erase
09:33:57 the video from the phone?
A. No.
Q. Did you determine whether there was a video on the phone?
A. I did not.
Q. Did any of the other officers, to your knowledge, look at the video on the phone?
A. Not to my knowledge.
Q. You said the question regarding the password for the ustream feature sounded vaguely familiar.
A. (Nods head.)
09:34:29 Q. Did I hear --
A. Yes.
Q. -- your answer properly?
A. That's correct.
Q. Do you remember one of the persons present asking Ms. Robinson for the password to the ustream feature of that cell phone?
A. I don't. Unfortunately, this incident was over two years ago. **If there were a video, that would be certainly to our benefit. I would love to have that video, but we weren't able to obtain it. I don't remember trying to obtain it.**
Q. You said it would certainly be to your benefit?
09:34:59 A. Absolutely.

19 Q. You wouldn't have erased such a video if
20 it --
21 A. Certainly --
22 Q. -- existed?
23 A. -- not.
24 Q. Nor, to your understanding, did any of the
25 other officers erase the video from the cell?
1 A. Correct.

Exh. F: McClain Depo: 12:10-14:1.

Plaintiffs cannot establish a violation of their First Amendment rights. For this reason, Defendants respectfully submit that summary judgment should be entered in favor of the Defendants.

C. Plaintiffs cannot establish Malicious Prosecution

The sixth cause of action in Plaintiff's Second Amended Complaint contends that "Defendants Savage, McClain, Sacco, Hernandez, Dobbs, [and] Dodd[1] intentionally and maliciously instituted a legal action against Plaintiffs without probable cause…. The criminal case against Plaintiffs was dismissed, resulting in the termination of the charges in their favor." *Pltfs' Sec. Am. Compl*. ¶¶ 121-122.

An officer has probable cause to arrest if the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); *see also Beck v. Ohio*, 379 U.S. 89, 91 (1964). For probable cause to exist, there need only be enough evidence to warrant the belief of a reasonable officer that an offense has been or is being committed; **evidence sufficient to convict is not required.** *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Under Ninth Circuit law, the court must look at the totality of the facts and circumstances

[1] Officer Dorinda Dodd has been dismissed from the instant lawsuit.

known to the officers at the moment of the arrest to determine whether probable cause existed. *Rohde v. City of Roseburg*, 137 F.3d 1142, 1144 (9th Cir. 1998).

Here, Plaintiffs claim that because they were not convicted, the officers' actions were tantamount to malicious prosecution. Such an allegation is neither supported by the facts of this case nor by the governing law. Therefore, Defendants respectfully request that summary judgment be entered in favor of the Defendants.

D. Plaintiffs' Claim for Common Law Negligence Fails

In order to prevail on a claim for common law negligence against a police officer, Plaintiffs must show that (1) the officer owed plaintiff a duty of care; (2) the officer breached the duty by failing "to use such skill, prudence, and diligence as other members of the [the] profession commonly possess and exercise," (3) there was a "proximate causal connection between the [officer's] negligence conduct and the resulting injury" to the plaintiff; and (4) the officer's negligence resulted in "actual loss or damage" to the plaintiff. *Harris v. Smith*, 157 Cal. App. 3d 100, 104 (1984). Therefore, "to prevail on the negligence claim, Plaintiffs must show that the Defendant officers acted unreasonably and that the unreasonable behavior harmed" Henderson. *Price v. County of San Diego*, 990 F.Supp. 1230, 1245 (1998).

As significantly, where a "federal court factually finds that the police officers' conduct was objectively reasonable and grants summary judgment, that decision bars a state negligence action premised upon violation of the same primary right." *Sanders v. City of Fresno*, 551 F.Supp. 2d 1149 (E.D.Cal. 2008)(citing *City of Simi Valley v. Superior Court*, 111 Cal. App. 4th 1077, 1084 (2003); *Oppenheimer v. City of Los Angeles*, 104 Cal. App. 2d 545, 549 (1951).

In their Second Amended Complaint, Plaintiffs allege both that their Fourth Amendment rights were violated and that Defendants Savage and McClain were negligent. Based on the authorities discussed above, Plaintiffs' Fourth Amendment rights were **not** violated. Furthermore, this Court has the authority to determine the officers enjoy qualified immunity. That decision by the court would likewise bar a state negligence action here. For this reason, the Defendants respectfully urge this Court to grant their Motion for Summary Judgment.

E. Plaintiffs' Claims for Improper Screening, Hiring, Training, Supervision, and *Monell* is Without Merit.

Plaintiffs' Eleventh, Twelfth, Thirteenth, and Fourteenth Causes of Action are based upon *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) alleging improper screening, hiring, training, supervision, and discipline. Initially, neither the City of San Diego nor its Police Chief William Lansdowne may be held liable for a constitutional violation of inadequate screening, hiring, training, supervision, and discipline if this Court finds the officers' actions were reasonable or that they did not violate decedent's constitutional rights. *Quintanilla v. City of Downey*, 84 F.3d 353, 355 (9th Cir. 1996); *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (no damages may be awarded against a municipal corporation based upon the actions of one of its officers when no constitutional harm was inflicted). This is true even if Department regulations authorized constitutionally excessive force. *Id*.

1. *General Law on a Monell Claim*.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that municipalities were "persons" under 42 U.S.C. section 1983 and thus, could be held liable for causing a constitutional violation. Liability for a police officer's actions at the scene under section 1983 is solely personal. *Duisen v. Administrator and Staff, Fulton St. Hosp., No.1, Futon, Mo.*, 332 F.Supp. 125 (W.D. Mo. 1971). Since liability under section 1983 is personal, the doctrine of respondeat superior is unavailable to impose vicarious liability under this section on another. *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981). A local government cannot be found liable under section 1983 based on a theory of respondeat superior alone. *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). In order to maintain a section 1983 action against a governmental entity, plaintiff must *allege and present* evidence that the allegedly unconstitutional activities of the police officer were pursuant to "policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the entity's] officers." *Id*. at 690; see also *Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 491 (9th Cir. 1986); *Carter v. Three Unknown Police Officers*, 619 F.Supp. 1253, 1361 (N.D. Del. 1985).

In *Monell*, the court stated that "a local government may not be sued under section 1983 for an injury inflicted by its employees or agents." *Id*. at 694. It is now established that such a plan or policy may not be proved through reference to a single unconstitutional activity unless "proof of the incident includes proof that it was caused by an existing, unconstitutional (municipal) policy." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985). To do so would essentially impose liability upon a municipality simply because the entity hired one "bad apple." *Id*. at 821; see also *Hudson v. Burke*, 617 F.Supp. 1501, 1507 (D.C. Ill. 1985).

It has long been held that a plaintiff may not rest a claim of municipal liability on general, unsupported or frivolous allegations of unconstitutional practice or pattern. *Monell, supra*; see also *City of Oklahoma City v. Tuttle, supra*. Conclusory, unspecific allegations which lack factual foundation fail to even meet the minimum pleading requirements established in the area of municipal liability under Section 1983.

Plaintiffs filed their complaint alleging general, conclusory allegations without any supporting facts. Nor has the record been developed which would support a *Monell* cause of action. The discovery generated by the parties in this matter demonstrates a complete and total lack of facts to support a *Monell* claim. See Exh. G.

For these reasons, Defendants respectfully request that this Court grant their Motion for Summary Judgment.

2. *Plaintiff is Unable to Establish That the City Was Deliberately Indifferent As to Training, Supervising, Disciplining and Hiring*.

The Supreme Court has held that "the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). Plaintiff must demonstrate that a particular municipal policy or custom was the "moving force of [the]constitutional violation" and harm suffered. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978); see *City of Canton*, 489 U.S. at 390. Inadequate training that manifests a deliberate indifference on the part of the municipality must be shown to have actually caused the constitutional deprivation. *City of Canton v. Harris*, 389 U.S. 378, 391 (1989); *Merritt v. County of Los Angeles*, 875 F.2d 765, 770 (9th Cir. 1989). In order to find a constitutional violation, there must be an affirmative link between the policy and the particular constitutional violation. *City of Oklahoma City v. Tuttle*, 47 U.S. 808, 823 (1985). A policy is " 'a deliberate choice to follow a course of action … made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002). However, "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *City of Canton*, 489 U.S. at 389. A municipality "cannot be held liable solely because it employs a tortfeasor" or "on a respondeat superior theory." *Monell*, 436 U.S. at 691.

For these reasons, Defendants respectfully request that this Court grant their Motion for Summary Judgment.

F. Unless the Court Finds the Actions of the Defendant Officers Unconstitutional, the City Cannot be Held Liable.

Chief Lansdowne and/or the City of San Diego cannot be held liable pursuant to a *Monell* cause of action unless the Court were to find the officer's actions for the arrest or excessive force unconstitutional. *Quintanilla v. City of Downey*, 84 F.3d 353, 355 (9th Cir. 1996); *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (no damages may be awarded against a municipal corporation based upon the actions of one of its officers when no constitutional harm was inflicted). This is true even if Department regulations authorized constitutionally excessive force. *Id*.

For these reasons, Defendants respectfully request that this Court grant their Motion for Summary Judgment.

IV. CONCLUSION

For the reasons set out above, Defendants urge this Court to grant their Motion for Summary Judgment. The Court may determine, as a matter of law, that the instant lawsuit filed by Plaintiffs against the officers and that the lawsuit should be dismissed. Defendants enjoy qualified immunity that insulates them from liability in this matter. Furthermore, Plaintiffs' allegations are unfounded and are not countenanced by the law. Thus, judgment should be entered in favor of defendants and against Plaintiffs.

Dated: January 31, 2013.

JAN I. GOLDSMITH, City Attorney

By *s/ Jennifer K. Gilman*
JENNIFER K. GILMAN
Deputy City Attorney
Attorneys for Defendants CITY OF SAN DIEGO, CHIEF OF POLICE WILLIAM LANSDOWNE, OFFICER D. McCLAIN, SAN DIEGO POLICE OFFICERS SAVAGE, SACCO, HERNANDEZ, DOBBS, and DODD.